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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BIGFOOT VENTURES, LTD.,

Plaintiff and Respondent,

v.

NEXTENGINE, INC.,

Defendant and Appellant.

B283811

(Los Angeles County  
Super. Ct. No. BC573303)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.

J. Kim and Johnny Kim for Defendant and Appellant.

Law Offices of Peter K. Moroh and Peter K. Moroh; Reich Radcliffe & Hoover, Marc G. Reich, and Richard J. Radcliff for Plaintiff and Respondent.

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Plaintiff and respondent Bigfoot Ventures, Ltd. filed suit against defendant and appellant NextEngine, Inc. for money due on default of a promissory note. The trial court granted Bigfoot's motion for summary adjudication, denied NextEngine's *ex parte* application for reconsideration, and thereafter entered judgment in favor of Bigfoot. On appeal, NextEngine contends the trial court erred in granting summary adjudication and in denying the request for reconsideration of its ruling. We affirm.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### **I. The Parties' 2008 Loan Agreement**

Bigfoot is a private venture capital company based in Hong Kong whose sole principal is Michael Gleissner. NextEngine is a private technology company based in Los Angeles whose chief executive officer is Mark Knighton. Both Gleissner and Knighton are shareholders of NextEngine. On June 2, 2008, the parties entered into six written agreements memorializing the terms of a loan from Bigfoot to NextEngine: (1) the Secured Promissory Note, (2) the Mutual Release Agreement, (3) the Assignment and License Agreement, (4) the Share Mortgage Agreement, (5) the Shareholders Agreement, and (6) the Pledge Agreement (collectively, the "2008 Loan Agreement").

Under the Secured Promissory Note, the principal amount of the loan was 5,535,376 euros. Interest accrued on the principal amount at a rate of 12 percent during the term of the loan. The entire principal and accrued interest were due and payable upon written demand by Bigfoot at any time after June 2, 2009, and had to be repaid in full by NextEngine within 10 calendar days of the written demand. If any portion of the principal or accrued interest was not paid in full within 10 calendar days of Bigfoot's

written demand, NextEngine was required to pay interest on the unpaid amount on a monthly basis at a default rate of 15 percent (the “monthly interest payment”). NextEngine’s failure to make any payment of principal or interest within 5 business days after the applicable due date would constitute an event of default. Upon the occurrence of an event of default, the entire unpaid principal and interest would become immediately due and payable. As a covenant for the promises made in the Secured Promissory Note, the parties agreed to concurrently enter into the Mutual Release Agreement and the Assignment and License Agreement.

Under the Mutual Release Agreement, NextEngine agreed to make certain royalty payments to Bigfoot as additional consideration for the loan. For so long as the Secured Promissory Note remained outstanding, NextEngine agreed to pay Bigfoot a quarterly fee based on the number of scanners that NextEngine sold during such quarterly period (the “quarterly fee payment”). Each quarterly fee payment was due within 30 days after the end of each calendar quarter. NextEngine’s failure to make any quarterly fee payment when due would constitute an event of default under the Secured Promissory Note.

As defined in the Secured Promissory Note, the collateral for the loan was the intellectual property rights held by NextPat Ltd., a Hong Kong company formed by Bigfoot and NextEngine for the purpose of holding that collateral. Under the Assignment and License Agreement, NextEngine assigned to NextPat all of its rights, title, and interest in NextEngine’s intellectual property, including its patents, copyrights, trademarks, and trade secrets, and NextPat granted to NextEngine an exclusive perpetual license to use the intellectual property rights.

Notwithstanding an event of default under the loan, the license would remain irrevocable for so long as NextEngine paid in full to Bigfoot (i) each monthly interest payment that was due by the end of each calendar month pursuant to the Secured Promissory Note and (ii) each quarterly fee payment that was due pursuant to the Mutual Release Agreement. For so long as the license remained irrevocable, NextPat agreed to retain all of the intellectual property rights assigned by NextEngine, and to defer any sale, solicitation for sale, or other disposition or encumbrance of the intellectual property rights. In the event the license became revocable, NextPat could terminate the license upon written notice to NextEngine.

The Secured Promissory Note was secured by the Share Mortgage Agreement and by a life insurance policy owned by NextEngine and assigned to Bigfoot pursuant to the Pledge Agreement. Under the Share Mortgage Agreement, NextPat had 100 shares of authorized capital of which 51 shares were issued to Bigfoot and 49 shares were issued to NextEngine. As security for the loan, NextEngine agreed to deposit with Bigfoot the share certificates evidencing its 49 shares in NextPat. Upon the occurrence of an event of default under the loan, NextEngine's 49 shares in NextPat automatically would transfer to Bigfoot. However, notwithstanding an event of default, for so long as NextEngine paid in full to Bigfoot (i) each monthly interest payment that was due by the end of each calendar month pursuant to the Secured Promissory Note and (ii) each quarterly fee payment that was due pursuant to the Mutual Release Agreement, Bigfoot agreed not to sell, solicit for sale, transfer, dispose of, or otherwise encumber any of the shares in NextPat or any of the intellectual property rights held by NextPat. If all

payments due under the loan were fully paid by NextEngine, Bigfoot would transfer the 49 mortgaged shares in NextPat back to NextEngine. However, if an event of default continued to occur and NextEngine failed to make any monthly interest payment or any quarterly fee payment when due, Bigfoot could thereafter solicit for sale and sell any part of the NextPat shares or any part of the intellectual property rights.

Under the Shareholders Agreement, if Bigfoot intended to sell any part of the intellectual property rights through a public auction, Bigfoot was required to notify NextEngine of such auction and allow NextEngine a reasonable opportunity to purchase the intellectual property rights at a higher bid. If Bigfoot intended to sell any part of the NextPat shares or the intellectual property rights through a private sale, Bigfoot was required to notify NextEngine of such pending sale and allow NextEngine five business days after receipt of the notice to offer a higher bid. In the event of a permitted sale of any of the NextPat shares or the intellectual property rights, the proceeds from the sale would be applied towards the satisfaction of the Secured Promissory Note without prejudice to Bigfoot's right to sue for any remaining deficiency.

## **II. The Prior Litigation**

In December 2009, Bigfoot filed suit against NextEngine, alleging causes of action for breach of the Secured Promissory Note and breach of the Mutual Release Agreement. In response, NextEngine filed a cross-complaint against Bigfoot for breach of a 2009 oral agreement, breach of the implied covenant of good faith and fair dealing, failure to preserve collateral in violation of the Uniform Commercial Code (UCC), and improper disposition of collateral in violation of the UCC. The parties' legal claims were

tried to a jury in October 2011. At the conclusion of the trial, the jury returned special verdict findings in favor of NextEngine on Bigfoot's claims for breach of the Secured Promissory Note and breach of the Mutual Release Agreement. The jury also returned special verdict findings in favor of NextEngine on its cross-claims for failure to preserve collateral and improper disposition of collateral in violation of the UCC, and found that NextEngine had suffered damages in the amount of \$4,506,000.

In May 2012, the trial court entered a judgment in favor of NextEngine on the jury's special verdict, and ordered that Bigfoot recover nothing from NextEngine and that NextEngine recover the sum of \$4,506,000 from Bigfoot. The trial court subsequently granted NextEngine's motion for attorney's fees, and ordered Bigfoot to pay \$724,951.22 in attorney's fees to NextEngine. Bigfoot filed an appeal from the May 2012 judgment in which it asserted that the jury's special verdict findings were not supported by sufficient evidence and were inconsistent. In December 2013, this court affirmed the May 2012 judgment in Appeal No. B242559.<sup>1</sup>

### **III. The Current Litigation**

On February 20, 2015, Bigfoot filed the current action against NextEngine, alleging a single cause of action for money due on default of a promissory note. Bigfoot's complaint alleged that the parties had entered into the Secured Promissory Note, that Bigfoot had provided NextEngine with a written demand for payment in accordance with the Note, and that NextEngine had

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<sup>1</sup> *Bigfoot Ventures, Ltd. v. NextEngine, Inc.* (Dec. 11, 2013, B242559) [nonpub. opn.].

failed to repay the amounts due under the Note in response to Bigfoot's written demand. The complaint requested that NextEngine be ordered to pay the total principal, interest, and quarterly fee payments due under the Secured Promissory Note, as well as attorney's fees and costs of suit.

In response, NextEngine filed a cross-complaint against Bigfoot. In a first amended cross-complaint, NextEngine alleged causes of action for conversion, failure to comply with the UCC, trespass to chattel, slander of title, and breach of the implied covenant of good faith and fair dealing. The gravamen of the cross-complaint was that, following the May 2012 judgment, Bigfoot continued to engage in conduct that violated the UCC and the terms of the Secured Promissory Note, including offering NextEngine's intellectual property for sale without the right to do so, appropriating NextEngine's trademark and other intellectual property rights without a proper disposition, and misrepresenting in its written demand the amount due under the Note. The cross-complaint sought compensatory damages, injunctive or equitable relief restraining the disposition and use of the intellectual property, attorney's fees, and costs of suit.

#### **IV. Bigfoot's Motion for Summary Adjudication**

On July 15, 2016, Bigfoot filed a motion for summary adjudication on its sole cause of action for money due on default of a promissory note. Bigfoot argued it was entitled to judgment as a matter of law on this claim because the undisputed facts established that (1) Bigfoot and NextEngine were parties to the Secured Promissory Note wherein NextEngine promised to pay Bigfoot the principle amount of the Note with accrued interest, plus the quarterly fee payments; (2) Bigfoot provided NextEngine with a written demand for payment of the Note on January 16,

2015; (3) NextEngine failed to pay Bigfoot the amounts due under the Note; and (4) NextEngine owed Bigfoot \$7,925,990 under the Note after deduction of an offset for the judgment and attorney's fees awarded in the prior litigation.

Bigfoot's motion was supported by a copy of the Secured Promissory Note and correspondence between the parties regarding the amounts due under the Note. In a January 16, 2015 letter to NextEngine, Bigfoot demanded payment of the entire unpaid principal and interest, and stated it would accept the prompt tender of \$8,049,846 as a compromise of NextEngine's payment obligations. In a February 6, 2015 follow-up letter to NextEngine, Bigfoot stated it had not received any response to its written demand, and it intended to seek the court's assistance to compel payment of the amounts due. In a February 11, 2015 email, NextEngine confirmed its receipt of Bigfoot's written demand for payment, and indicated it would be providing an updated accounting of the balance due under the Note. NextEngine further stated it was "working hard on new initiatives that can give us the ability to repay the balance," and it was "hopeful this will allow us to begin balance reduction payments . . . and to make regular payments until it is fully paid off." The motion also was supported by copies of the special verdict, judgment, and attorney's fees award in the prior action, as well as NextEngine's responses to special interrogatories regarding its calculation of the amounts due under the Note. As calculated by NextEngine, the total balance due under the Note as of June 2016 was \$7,925,990 (after applying an offset of \$4,506,000 for the May 2012 judgment and \$724,951.22 for the January 2013 attorney's fees award).



In its opposition to Bigfoot's summary adjudication motion, NextEngine argued that (1) no default of the Secured Promissory Note had occurred because Bigfoot overstated the balance due under the Note in its written demand for payment and its civil complaint, and (2) Bigfoot's conduct in misappropriating the intellectual property collateral and offering it for sale without authorization provided NextEngine with an affirmative defense to the claim. NextEngine's opposition was supported by a declaration from its CEO, Mark Knighton. According to Knighton, the parties had credited the total amount awarded to NextEngine in the prior action (consisting of the \$4,506,000 judgment and \$724,951.22 attorney's fees award) to the principal balance due under the Note. Knighton also stated that, since the prior action, Bigfoot had continued to engage in the unauthorized use of NextEngine's intellectual property by operating certain websites to offer the intellectual property for sale and to misappropriate NextEngine's trademark. Knighton asserted that such conduct had caused damage to NextEngine by diminishing its stock value, harming its business operations, and interfering with its ability to retire the Note. Knighton's declaration attached a copy of the complete 2008 Loan Agreement, additional correspondence between the parties regarding the amounts due under the Note, and documents purporting to show that Bigfoot was doing business as a company called NextEngine Ventures, which operated the websites at [www.nextengine-auction.com](http://www.nextengine-auction.com) and [www.nextengineventures.com](http://www.nextengineventures.com).

In its reply, Bigfoot asserted that NextEngine's claim about an alleged overdemand for payment did not raise a triable issue of fact because Bigfoot's summary adjudication motion relied on NextEngine's own principal, interest, and royalty calculations to

show the total amount owed under the Secured Promissory Note. Bigfoot further argued that NextEngine's allegations about an unauthorized use of its intellectual property were solely relevant to its cross-claims, and did not preclude Bigfoot from enforcing its right to recover the balance due under the Note.<sup>2</sup> In conjunction with its reply, Bigfoot also filed evidentiary objections to Knighton's declaration.

On October 21, 2016, the trial court granted Bigfoot's motion for summary adjudication on its sole cause of action for money due on default of a promissory note, and ordered that Bigfoot was entitled to recover \$7,925,990 from NextEngine. Trial on NextEngine's cross-complaint was set for March 6, 2017.

#### **V. NextEngine's *Ex Parte* Request for Reconsideration**

On February 27, 2017, NextEngine filed an *ex parte* application for reconsideration of the order granting Bigfoot's motion for summary adjudication. NextEngine asked the trial court to vacate its prior order on the ground that new evidence showed that (1) Bigfoot did not terminate NextEngine's exclusive license to use the intellectual property until January 2017, and (2) NextEngine Ventures, Ltd. was part of Bigfoot's group of companies and was the registered owner of the auction website that was being used to offer the intellectual property for sale. NextEngine argued that such evidence demonstrated that Bigfoot was engaging in the same conduct that had formed the basis of the special verdict in the prior action in which the jury found in favor of NextEngine on Bigfoot's claim for breach of the Secured

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<sup>2</sup> Bigfoot acknowledged, however, that any damages that might be awarded to NextEngine on its cross-claims could later be used to offset the amount owed to Bigfoot under the Note.

Promissory Note. NextEngine also asserted that the doctrine of collateral estoppel precluded Bigfoot from relitigating whether its conduct in attempting to sell the intellectual property prior to terminating NextEngine's license complied with the terms of the Note and the relevant provisions of the UCC.

The trial court denied NextEngine's *ex parte* application. At a February 27, 2017 hearing on the matter, the court explained that NextEngine's request for reconsideration of the order granting summary adjudication was not a proper basis for *ex parte* relief and was not timely filed. The court also stated that NextEngine's allegations regarding how Bigfoot was handling the intellectual property did not justify reconsideration of its summary adjudication ruling because the allegations appeared to "fall within the scope of the cross-claims that remain in the case asserted by NextEngine and that are the subject of the trial."

## **VI. Judgment**

On March 6, 2017, the day the trial of the cross-claims was set to start, NextEngine voluntarily dismissed its cross-complaint against Bigfoot without prejudice. On March 16, 2017, the trial court entered judgment in favor of Bigfoot on its complaint and ordered that Bigfoot recover from NextEngine the sum of \$8,223,486, consisting of \$7,925,990 on Bigfoot's claim for money due on a promissory note plus \$297,496 in prejudgment interest. Following the entry of judgment, NextEngine filed a notice of appeal.

## DISCUSSION

### I. Motion for Summary Adjudication

On appeal, NextEngine challenges the trial court's order granting Bigfoot's motion for summary adjudication on its claim for money due on default of a promissory note. NextEngine contends the trial court erred in sustaining Bigfoot's objections to certain evidence offered in opposition to the motion. NextEngine also claims there were triable issues of material fact as to whether Bigfoot's conduct in continuing to offer the intellectual property for sale following the prior action precluded it from recovering any amounts due under the Secured Promissory Note.

#### A. Standard of Review

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*)). "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1); see also *Aguilar, supra*, at p. 850.) The party opposing summary judgment may "not rely upon the allegations or denials of its pleadings," but rather "shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (Code Civ. Proc., § 437c, subd. (p)(1).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850.)

Where summary judgment is granted, we review the trial court's ruling de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) We consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037; *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705; *Yanowitz v. L'Oreal USA, Inc., supra*, at p. 1037.) We affirm summary judgment where it is shown that no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

**B. NextEngine Has Failed to Demonstrate Error in the Trial Court's Evidentiary Rulings**

In a declaration filed in support of NextEngine's opposition to the motion for summary adjudication, Knighton stated that Bigfoot was engaging in the unauthorized use of NextEngine's intellectual property in a manner that was harmful to NextEngine. Knighton specifically asserted in paragraphs six through nine of his declaration that Bigfoot was continuing to offer the intellectual property for sale on a certain website, and was using NextEngine's trademark on another website in violation of its exclusive license. Bigfoot filed evidentiary objections to each of these paragraphs in Knighton's declaration on multiple grounds.

On appeal, NextEngine contends that the trial court erred by issuing a blanket ruling sustaining Bigfoot's objections to paragraphs six through nine in Knighton's declaration rather

than individually considering each objection. NextEngine also claims that the trial court should have overruled the objections to Knighton's statements about Bigfoot's alleged efforts to sell the intellectual property because such evidence was admissible to show that Bigfoot was failing to comply with its obligations under the Secured Promissory Note. Bigfoot, on the other hand, argues that NextEngine failed to provide an adequate record on appeal to demonstrate error in the trial court's evidentiary rulings because NextEngine did not include a reporter's transcript of the summary adjudication hearing. Bigfoot also asserts that, even if the record is adequate, the trial court did not abuse its discretion in ruling on the objections to NextEngine's evidence.

We first address whether NextEngine has provided an adequate record to permit review of the trial court's evidentiary rulings. It is a fundamental rule of appellate review is that an appealed judgment or order is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. . . . [Citations.]" (*Ibid.*) To overcome this presumption, the appellant must provide an adequate appellate record demonstrating error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) "A necessary corollary to this rule [is] that a record is inadequate . . . if the appellant predicates error only on the part of the record he [or she] provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed." [Citation.] [Citation.] Where the appellant fails to provide an adequate record of the challenged proceedings, we must presume that the appealed judgment or order is correct,

and on that basis, affirm. [Citations.]” (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 644; see *Maria P. v. Riles, supra*, at pp. 1295-1296.)

The California Rules of Court provide that, [i]f an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court, the record on appeal must include a record of these oral proceedings” in the form of a reporter’s transcript, agreed statement, or settled statement. (Cal. Rules of Court, rule 8.120(b).) The Rules also require an appellant who elects to proceed by appendix to include, among other things, any document filed in the trial court which “is necessary for proper consideration of the issues.” (Cal. Rules of Court, rule 8.124(b)(1)(B).) Here, NextEngine chose to proceed by an appendix and included copies of all the papers filed by the parties concerning the summary adjudication motion. However, the record on appeal does not include a reporter’s transcript of the hearing on the motion, or a settled or agreed statement setting forth what transpired during that hearing. The record also does not include a copy of any written order by the trial court granting the summary adjudication motion or sustaining any of Bigfoot’s evidentiary objections. Instead, the appendix provided by NextEngine merely includes a document entitled “Tentative Ruling,” which on its face does not purport to be a final order.<sup>3</sup>

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<sup>3</sup> This document appears in the record as Exhibit D to an attorney declaration offered in support of NextEngine’s *ex parte* application for reconsideration. In the declaration, NextEngine’s attorney stated that, on October 21, 2016, the court clerk sent a notice by email that the court had adopted its tentative ruling on the summary adjudication motion as its final order, and that a true and copy of the clerk’s email was attached as Exhibit D. However, Exhibit D does not include a copy of any email from the

While the appendix does include a judgment reflecting that the trial court granted the summary adjudication motion on October 21, 2016, the judgment contains no reference to any evidentiary rulings made in connection with the motion. Given the absence of a reporter's transcript or final written order showing how Bigfoot's objections to NextEngine's proffered evidence were adjudicated, NextEngine has failed to demonstrate error in the trial court's evidentiary rulings.

Moreover, even if we were to treat the document entitled "Tentative Ruling" as a final order on the summary adjudication motion, NextEngine has not met its burden of affirmatively showing error in the challenged order. In the "Tentative Ruling," the trial court stated that "[for] the Mark Knighton declaration, Objections 1–5 are overruled, and Objections 6–9 are sustained." NextEngine asserts that the trial court erred in sustaining Objections 6–9 because it made an improper blanket ruling that precludes meaningful appellate review. However, in the absence of a reporter's transcript of the summary adjudication hearing, we cannot determine to what extent the trial court may have addressed the merits of each individual objection at that hearing, or otherwise explained its reasoning for excluding some of NextEngine's proffered evidence. In any event, given that the trial court sustained only four of the nine categories of objections made by Bigfoot, the fact that the court failed to specify the basis for its evidentiary rulings in a written order does not constitute prejudicial error. (See *Twenty-Nine Palms Enterprises Corp. v.*

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clerk or other document indicating that the court had issued a final order. Instead, Exhibit D merely contains a copy of the document entitled "Tentative Ruling."



*Bardos* (2012) 210 Cal.App.4th 1435, 1447 [trial court erred in sustaining 33 objections that were 48 pages in length and to large sections of a declaration based on a variety of grounds]; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255-256 [trial court erred in summarily sustaining all but one of 764 evidentiary objections].)

Apart from asserting that the trial court erred by issuing a blanket ruling on the evidentiary objections, NextEngine only challenges the merits of the ruling as to one paragraph in Knighton's declaration. Specifically, NextEngine argues that, under a de novo standard of review, the entirety of paragraph six of the declaration and the exhibits attached thereto should have been admitted. The standard of review applicable to evidentiary rulings in summary judgment proceedings remains unsettled. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535, ["we need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"]; *Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226 [noting the "California Supreme Court expressly declined to reach the issue of the appropriate standard of review for reviewing a trial court's rulings on evidentiary objections made in connection with a summary judgment motion"]; *Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 368 ["[c]ourts are split regarding the proper standard of review for the trial court's evidentiary rulings in connection with motions for summary judgment and summary adjudication"].) However, even if we apply a de novo standard of review, we conclude that only a small portion of the evidence at issue was admissible.

Paragraph six of Knighton's declaration stated as follows: "Prompted by this case, I have recently visited Bigfoot's website at [www.nextengine-auction.com](http://www.nextengine-auction.com), attached as Exhibit 8. The site continues to offer NextEngine's IP for sale to this day. I have reviewed the Domain Tools report which was made at my request, and attached as Exhibit 10. This details the activity with that site, and I was surprised to discover that Bigfoot was actually actively renewing the site, even long after the Judgment in the prior case. This website infringes the NextEngine trademark, and the offer of sale of the IP is unauthorized and harmful to our company." Bigfoot objected to this paragraph on various grounds, including relevance, misstating the evidence, lack of foundation, lack of personal knowledge, best evidence, argumentative, vague and ambiguous as to time, impermissible legal conclusion, and improper lay opinion.

Based on our review of the declaration, we conclude that Knighton's statements describing what the auction website and the domain report purported to show about the sale of the intellectual property were properly excluded. While Knighton could state that he recently had visited the website, the copy of the page that he asserts was printed from that site cannot be considered for content, which remains hearsay. Thus, his assertion that [t]he site continues to offer NextEngine's IP for sale to this day" was inadmissible. Knighton was not the owner or operator of the website, and the page that he attached to his declaration does not indicate its provenance. Likewise, while Knighton could assert that he reviewed a DomainTools report for the auction website, attaching a copy of that report to his declaration and concluding that "Bigfoot was actually actively renewing the site, even long after the Judgment in the prior case"

was also inadmissible. Knighton did not purport to be an expert on how the DomainTools report was created or what specific data it contained about the auction website's recent activity, and thus, his characterization of the report's significance was based on an improper lay opinion. Additionally, Knighton's statements that the site "infringes the NextEngine trademark" and that "the offer of sale of the IP is unauthorized and harmful" were properly excluded because they were argumentative and constituted an impermissible legal conclusion.

Accordingly, in reviewing the trial court's ruling on the motion for summary adjudication, we consider the evidence that Knighton had at some time visited the website at [www.nextengine-auction.com](http://www.nextengine-auction.com), and had reviewed a DomainTools report that he requested for that site. We do not, however, consider Knighton's statements about what those writings purported to show, or any of the other evidence set forth in paragraphs six through nine of the declaration, because NextEngine failed to demonstrate that such evidence was erroneously excluded.

**C. The Trial Court Properly Granted Bigfoot's Motion for Summary Adjudication**

On appeal, NextEngine argues that the trial court erred in granting Bigfoot's motion for summary adjudication on its claim for money due on the Secured Promissory Note because there were triable issues of material fact as to whether Bigfoot complied with its obligations under the Note. NextEngine asserts that it presented evidence showing that Bigfoot was not substantially complying with its contractual obligations because it was continuing to offer the intellectual property for sale on the auction website while NextEngine held an exclusive license for

its use. NextEngine further contends that this same conduct by Bigfoot formed the basis for the jury's special verdict in the prior action, and thus, Bigfoot was collaterally estopped from litigating whether its current efforts to sell the intellectual property without first terminating NextEngine's license complied with the terms of the Note and the relevant provisions the UCC.

Because NextEngine's argument relies, in significant part, on the jury's special verdict findings in the prior litigation, we first address the extent to which those findings affect Bigfoot's present right to recover from NextEngine the amounts due under the Secured Promissory Note. At the trial in the prior action, the parties submitted to the jury a special verdict form consisting of 47 questions. On Bigfoot's claim for breach of the Secured Promissory Note, Question 1 on the special verdict form asked the jury whether Bigfoot and NextEngine had entered into the Note. The jury answered "Yes" to this question. Question 2 asked the jury if Bigfoot did all, or substantially all, of the significant things that the Note required it to do. The jury answered "No" to this question. Based on its answer to Question 2, the jury was instructed not to respond to any further questions on Bigfoot's claim for breach of the promissory note. As a result, the jury never reached the special verdict questions regarding whether NextEngine had performed all of its obligations under the Note, and if not, what amount was due and owing to Bigfoot.

In its appeal from the judgment in the prior action, Bigfoot asserted, among other arguments, that the jury's special verdict finding on Question 2 was not supported by substantial evidence. In affirming the judgment, we concluded that the evidence was sufficient to support the jury's finding because the evidence at trial established that, on December 3, 2009, Bigfoot conducted a

public auction of the intellectual property owned by NextPat while NextEngine continued to hold an exclusive and perpetual license to use the intellectual property. We concluded that, based on such evidence, the jury reasonably could have found that, by failing to terminate NextEngine's license prior to conducting the public auction, Bigfoot did not do all of the significant things the Secured Promissory Note required it to do.

In our prior opinion, we also addressed the parties' arguments about the impact of the jury's special verdict findings on NextEngine's payment obligations. As we explained: "Bigfoot argues that the jury's verdict effectively precludes it from ever recovering from NextEngine the amount that indisputably is due under the terms of the 2008 promissory note. NextEngine, on the other hand, asserts that the jury's verdict does not limit Bigfoot's right to repayment of the loan because the jury made no finding as to the amount due under the note; it merely found that Bigfoot was not entitled to recover damages based on an alleged breach of the note by NextEngine. We agree with NextEngine that the jury's special verdict findings did not have the effect of eliminating NextEngine's payment obligations under the 2008 Secured Promissory Note. As NextEngine has conceded on appeal, the jury's verdict did not change the amounts due under the note or otherwise alter NextEngine's obligation to pay the note according to its terms. Bigfoot accordingly is not precluded from seeking to enforce its right to recover the payments owed by NextEngine under the 2008 Loan Agreement, provided however, that any future enforcement action taken by Bigfoot must comply with the terms of the parties' agreement and the relevant provisions of the UCC."

In the present action, Bigfoot sought to enforce its right to recover the payments owed under the 2008 Loan Agreement by asserting a single cause of action against NextEngine for money due on default of a promissory note. In moving for summary adjudication on this claim, Bigfoot presented undisputed evidence that (1) the parties had entered into the Secured Promissory Note; (2) Bigfoot provided NextEngine with a written demand for payment of the Note on January 16, 2015; (3) NextEngine failed to pay Bigfoot any amount in response to the written demand; and (4) based on NextEngine's own calculations, the amount due under the Note (after deduction of an offset for the judgment and attorney's fees awarded in the prior action) was \$7,925,990. Based on such undisputed evidence, Bigfoot met its burden of showing that it was entitled to judgment as a matter of law on this claim. (See *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 383 [in an action for nonpayment of a promissory note, "the plaintiff must plead the existence of a contract, its terms which establish the obligation in issue, the occurrence of any conditions precedent to enforcement of the obligation, and the breach of that obligation"]; *Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1133 [in an action for breach of a promissory note, "the introduction of the note in evidence establishes a *prima facie* right to recover according to its terms"].)

In arguing that summary adjudication of Bigfoot's claim was improper, NextEngine asserts that it presented a complete defense to the claim by submitting evidence that, following the May 2012 judgment in the prior action, Bigfoot continued to engage in efforts to sell the intellectual property collateral without first terminating NextEngine's exclusive license. However, the admissible evidence presented by NextEngine in

opposition to the motion did not raise a triable issue of fact as to this alleged defense. The admissible portion of Knighton's declaration does not suffice, as the content he relies on is not properly considered.

As this court made clear in affirming the judgment in the prior action, Bigfoot was not barred from seeking to recover from NextEngine the balance due under the Secured Promissory Note, provided that any action taken by Bigfoot to enforce its right to repayment of the Note complied with the terms of the parties' agreement. In the present action, NextEngine sought to defeat Bigfoot's summary adjudication motion by showing that Bigfoot was precluded from enforcing its right to recover the amounts indisputably owed under the Note because Bigfoot did not fully comply with all of its contractual obligations in the 2008 Loan Agreement. However, in opposing Bigfoot's motion, NextEngine failed to present admissible evidence demonstrating the existence of a triable issue of material fact as to Bigfoot's cause of action or NextEngine's defenses thereto. Under these circumstances, the trial court did not err in granting summary adjudication on Bigfoot's claim for money due on default of a promissory note.

## **II. *Ex Parte* Application for Reconsideration**

On appeal, NextEngine also contends that the trial court erred in denying its *ex parte* application for reconsideration of the order granting the summary adjudication motion. NextEngine claims that it was entitled to reconsideration of the summary adjudication ruling because newly discovered evidence supported its defense that Bigfoot was continuing to offer the intellectual property for sale in contravention of the terms of the Secured Promissory Note and the relevant provisions of the UCC.

### **A. Standard of Review**

Code of Civil Procedure section 1008 provides that, within 10 days after service of a written notice of entry of an order, a party may make a motion to reconsider the order “based upon new or different facts, circumstances, or law.” (Code Civ. Proc., § 1008, subd. (a).) “The moving party also must provide a satisfactory explanation for the failure to make the showing at or before the time the challenged order was issued.” (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 208.) We review a trial court’s ruling on a motion for reconsideration for an abuse of discretion. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1339; *Yolo County Dept. of Child Support Services v. Myers* (2016) 248 Cal.App.4th 42, 50.)

### **B. The Trial Court Properly Denied NextEngine’s Ex Parte Application for Reconsideration**

In its *ex parte* application for reconsideration of the order granting summary adjudication, NextEngine asserted that three newly discovered items of evidence supported its defense to Bigfoot’s claim: (1) Bigfoot’s October 7, 2016 discovery responses admitting that NextEngine Ventures, Ltd. was part of the Bigfoot Group of companies; (2) Bigfoot’s January 24, 2017 discovery responses admitting that NextEngine Ventures was the original registrant of the domain name for the auction website; and (3) a January 20, 2017 notice from Bigfoot purporting to terminate NextEngine’s exclusive license to use the intellectual property. NextEngine argued that such evidence showed that Bigfoot had continued to offer the intellectual property for sale through the auction website without first terminating NextEngine’s license.

We conclude that NextEngine failed to establish that it was entitled to reconsideration of the summary adjudication ruling.



The trial court granted the summary adjudication motion on October 21, 2016, and NextEngine filed its *ex parte* application for reconsideration more than four months later on February 27, 2017.<sup>4</sup> NextEngine did not provide a satisfactory explanation for its failure to produce the alleged newly discovered evidence at an earlier time. Although NextEngine asserted that Bigfoot did not serve its discovery responses until after NextEngine had filed its opposition to the summary adjudication motion, it offered no explanation for why it did not propound the discovery earlier or seek a continuance of the summary adjudication hearing to obtain facts essential to its opposition. (*New York Times Co. v. Superior Court*, *supra*, 135 Cal.App.4th at pp. 213-215 [deposition testimony did not constitute new or different facts to support reconsideration of a summary judgment ruling where evidence was obtainable through the discovery process and no request for a continuance was made].) Moreover, while NextEngine argued that Bigfoot’s January 20, 2017 termination notice proved that NextEngine held an exclusive license to use the intellectual property prior to that date, it failed to explain why the status of its own license was a new or different fact that could not have been presented to the trial court earlier. (*People v. Safety National Casualty Corp.* (2010) 186 Cal.App.4th 959, 974 [“[f]acts of which a party seeking reconsideration was aware at the time of the original ruling are not ‘new or different facts’”].)

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<sup>4</sup> NextEngine contends that it was not required to comply with the 10-day deadline for filing a motion for reconsideration because Bigfoot never served it with a notice of entry of the order granting the summary adjudication motion. We need not decide, however, whether the 10-day time limit applied to NextEngine’s *ex parte* application because the application did not satisfy the other statutory requirements for reconsideration.

NextEngine also failed to demonstrate how the alleged newly discovered evidence justified reconsideration of the order granting summary adjudication. The evidence that NextEngine offered in support of its *ex parte* application merely showed that a company operated by Bigfoot was the original registered owner of the auction website, and that NextEngine held an exclusive license to use the intellectual property until Bigfoot terminated the license in early 2017. Contrary to NextEngine's contention, however, the evidence did not show that, following the judgment in the prior action, Bigfoot continued to actively use the auction website to offer the intellectual property for sale in violation of NextEngine's exclusive license. Accordingly, even if NextEngine had submitted this evidence with its opposition to the summary adjudication motion, it would not have demonstrated the existence of a triable issue of material fact as to Bigfoot's claim for money due on the promissory note. On this record, the trial court did not abuse its discretion in denying NextEngine's *ex parte* application for reconsideration.

**DISPOSITION**

The judgment is affirmed. Bigfoot shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.